SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

BEN HUSTON,

Plaintiff,

- against-

KAL REALTY PARTNERS LLC,

Defendant.

INDEX NO. 109546/10

MOTION SEQ. NO. 002

The following papers, numbered were read on this motion by defendant seeking leave to serve an Amended Answer as well as seeking use and occupancy from plaintiff

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

Cross-Motion: ☐ Yes ■ No

Kal Realty Partners LLC (defendant) moves by Order to Show Cause seeking leave, pursuant to CPLR 3025(b), to serve an amended answer to Ben Huston's (plaintiff) complaint filed on July 19, 2010. Defendant also seeks an order directing plaintiff to pay use and occupancy in the amount of $4,200.00 per month, from the expiration of his lease on November 30, 2010, during the pendency of this action.

BACKGROUND

Plaintiff, is the current tenant at 281 Grand Street, Apartment 5F, New York, NY (the apartment). Defendant is the owner and landlord of 281 Grand Street, New York, NY (the building).[1] Plaintiff originally occupied apartment 5F pursuant to a written lease agreement dated April 29, 2009. The lease was for a term of eighteen months, from June 1, 2009 through November 30, 2010 (*see* Order to Show Cause, exhibit A). The monthly rent for the entire lease term was $4,200.00 (*id.*).

[1] The previous owner of the building, Fran Realty Corp. (1975-2007), converted the upper floors to residential spaces. The prior owner did not recognize any of its tenants as rent regulated. Fran Realty never registered any of its residential apartments with the Division of House and Community Renewal.

On or about August of 2010, plaintiff stopped paying rent due to a dispute regarding whether the apartment is rent regulated, and plaintiff continues to occupy the apartment without paying rent. On September 10, 2010 defendant commenced a summary nonpayment proceeding in Civil Court (*see id.*, exhibit E). This Court denied plaintiff's request to consolidate the nonpayment action with this action (*id.*, exhibit F). Defendant asserts that plaintiff is in arrears in the amount of $68,000.00, pursuant to the terms of the lease agreement, $54,600.00 of which has accrued since the lease expired November 30, 2010 (*see* Affidavit in Support of Order to Show Cause, ¶ 9). The nonpayment proceeding has been marked off calendar in civil court.

Plaintiff commenced this action by the filing of a summons and complaint on or about July 19, 2010 (Order to Show Cause, exhibit C). Plaintiff alleges that the building is subject to Rent Stabilization Law, and that the $4,200.00 monthly rent exceeds the maximum legal rent. In his complaint, plaintiff seeks a declaration that the apartment is rent stabilized; a mandatory injunction directing defendant to properly register the subject apartment with the Division of House and Community Renewal (DHCR) and to obtain an amended Certificate of Occupancy; damages for rent overcharge; and attorney's fees.

Defendant filed an answer on or about September 10, 2010, asserting that the apartment is not rent stabilized for two reasons: (1) the dimensions of all apartments in the building were materially and substantially changed to entitle the landlord to charge a "first rent"; and (2) the subject building was substantially rehabilitated so as to remove it from rent regulation (*id.*, exhibit D). No discovery has taken place on this action and Note of Issue has not been filed.

Defendant now seeks leave to serve and file an amended answer, and to compel plaintiff to pay the use and occupancy that has accrued since the lease expired. In the nonpayment proceeding in Civil Court defendant seeks rent from August of 2010 until the end

of the lease on November 30, 2010. In its proposed amended answer, defendant withdraws the defense that the building underwent a substantial rehabilitation (*id.*, exhibit G). Defendant's proposed amended answer specifies two occasions when the outer dimensions of the apartment were altered to entitle defendant to unregulated "first rent" (*id.*). Defendant further asserts, *inter alia*, even if the apartment was at one time rent regulated, it (1) became vacant in 2001 with rent in excess of $2,000.00 and therefore became unregulated; (2) became vacant again in 2009 with rent in excess of $2,000.00 and therefore became unregulated, and (3) underwent extensive renovation in 2010 at a cost of over $80,000.00, therefore bringing the rent over $2,000 and deregulating the apartment.[2]

Defendant asserts that, pursuant to CPLR 3025(b), "[a] party may amend his pleading…at any time by leave of court. Leave shall be freely given upon such terms as may be just." Defendant further asserts where discovery has not proceeded, as such as this case, there is no prejudice to plaintiff in permitting him to amend his pleading, and leave should be granted (*see Seda v New York City Hous. Auth.*, 181 AD2d 469, 470 [1st Dept 1992]). Defendant avers that once a party seeking to amend its pleading has established lack of prejudice, the motion should be granted unless the proposed amended pleadings are devoid of merit (*see Lucido v Mancuso*, 49 AD3d, 220 [2d Dept 2008]). Defendant further states that a motion to amend does not require an evidentiary showing of merit (*MBIA Ins. Corp. v Greystone &Co., Inc.*, 74 Ad3d 499 [1st Dept 2010]). Defendant claims an amended pleading only needs to "fit within a cognizable legal theory as a cause of action or defense" (*Raczok v Capasso*, 32 Misc3d 1242[A], Slip Op 51680[U] [Sup Ct, Kings County 2011]). Defendant asserts his proposed answer and six affirmative defenses meet this standard and have merit.

[2] The apartments in the building were divided into two separate units on or around 2000 or 2001. The tenant in apartment 5F starting in March 2001 paid a monthly rent of $3,500.00 The subsequent tenant (who was the last tenant to rent the apartment prior to plaintiff) in apartment 5F starting in December 2001 paid a monthly rent of $3,500.00

Defendant's first affirmative defense in its proposed answer states that the subject apartment is exempt from rent stabilization because it was newly created in or about 2000, and the first tenants paid rent in excess of $2,000.00 per month[3] (*see* Order to Show Cause, exhibit G, ¶¶47-50). Defendant states that the division of the fifth floor into two units rendered any prior rental history meaningless (*see Matter of 300 W. 49th St. Assoc. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 212 AD2d 250 [1st Dept 1995]). Accordingly, pursuant to the Division of Housing and Community Renewal (DCHR) "first rent" policy the landlord could legally charge whatever the first tenant agreed to pay. Defendant claims that since Rent Stabilization Code 2520.11(r)(10) provides that an apartment which qualifies for first rent in excess of $2,000.00 is exempt from regulation, the $3,500.00 in first rent paid by a prior tenant for the apartment qualifies apartment 5F for a regulation exemption (*see* Order to Show Cause).

Defendant's second affirmative defense in its proposed answer relies on Rent Stabilization Code 2520.11(r)(4), which provides that when an apartment becomes vacant after June 19, 1997 with a legal rent over $2,000.00 the apartment becomes deregulated. Defendants claim the apartment became deregulated when tenants Friedman and Brown, who were paying $3,500.00 in monthly rent, moved out in 2001. Defendant's third affirmative defense in its proposed answer is similar to its second proposed affirmative defense. Defendants assert that the apartment would be once again considered deregulated when tenant Vilga, who's rent was far in excess of $2,000.00 a month, moved out in 2009 (*see* Order to Show Cause, exhibit G, ¶¶55-61).

Defendant's fourth proposed affirmative defense asserts that defendant was entitled to charge a first rent to plaintiff because the outer dimensions of the apartment were altered

[3] Rent was $3,500.00 when apartment 5F was created in or about 2000 or 2001.

(Order to Show Cause, exhibit G, ¶¶62-65). Defendant claims that because the first rent charged to plaintiff exceeded $2,000.00, the apartment would be deregulated.

Defendant's fifth proposed affirmative defense states that even if the Court were to find that the apartment was rent regulated and the other affirmative defenses were not appropriate, the apartment would still be unregulated, simply because defendant spent in excess of $80,000.00 to renovate the apartment prior to plaintiff moving in (*see* Order to Show Cause, exhibit G, ¶¶66-69). Pursuant to Rent Stabilization Code §§2522.4(a)(1) and 2522.4(a)(4), defendant avers it was entitled to increase legal regulated rent by 1/40th of the cost of its renovation. Defendant claims that because of the $80,000.00 renovation they would have been entitled to increase the rent legally by more than $2,000.00 after tenant Vilga vacated the apartment. Defendant asserts that the increase in rent due to the renovations would be enough to deregulate the apartment.

Defendant's sixth proposed affirmative defense challenges plaintiff's demand for an injunction, requiring it to obtain a Certificate of Occupancy for the building (*see* Order to Show Cause, exhibit C, ¶37). Defendant asserts plaintiff's claim is moot because the Certificate of Occupancy has already been issued (*id.*, exhibit G, ¶¶70-71).

Defendant is also seeking an order, pursuant to Real Property Law § 220, directing plaintiff to pay use and occupancy during the pendency of this action. Defendant asserts that the Appellate Division, First Department has made clear that the Supreme Court during a landlord/tenant action cannot allow a tenant to occupy the subject premises without payment during the pendency of the action (*see MMB Assoc. v Dayan*, 169 AD2d 422 [1st Dept 1991]).

Plaintiff asserts the defenses brought forward by defendant in its proposed amended answer are devoid of merit and should be disallowed. Plaintiff claims that the 2001 project completed by the former owner, in which defendant claims to have split the larger apartments on the second through fifth floors of the building did not constitute a substantial rehabilitation.

Plaintiff states that there was no replacement of any portion to the building or building-wide systems, but that there were only repairs and refurbishments completed (*see* Affirmation in Opposition to Order to Show Cause, ¶¶ 16-18)

Plaintiff further asserts that the 2001 project does not constitute a substantial rehabilitation that would qualify for an exemption from rent stabilization because no new Certificate of Occupancy was issued after the work was completed. Plaintiff presents evidence that the Certificate of Occupancy in place prior to the Certificate of Occupancy issued on September 28, 2010, was issued in 1984, which only permitted eight Class A apartments, not the sixteen that are there presently (*see* Affirmation in Opposition to Order to Show Cause, ¶ 19). Plaintiff claims that because no new Certificate of Occupancy was issued, the project could not be considered a substantial renovation and also would not qualify it for an exemption from rent stabilization (*see Fried v Gates*, 20 Misc 3d 1126[A], Slip Op 51631[U] *2 [Civ Ct, Kings County 2008]). Plaintiff further states that rents charged to other tenants in 2001 and 2009 were not legal rents because the building was not a legal residence (*see* Affirmation in Opposition to Order to Show Cause, ¶22).

Plaintiff also asserts that the 2001 construction which split eight units into sixteen did not create a new unit with a first rent over $2,000.00, as the splitting of a unit into two does not create a new unit when the outer perimeter wall dimensions remained the same (*see id.*, ¶24). Plaintiff also claims that since there was no prior DHCR rent regulation history, the entire principle of rent deregulation is meaningless in this case. If rent regulations were not complied with in the past, plaintiff asserts defendant cannot prove that apartments have been properly deregulated by legal rents being over $2,000.00 (*see id.*, ¶¶ 25-27). Plaintiff attempts to further detract from the argument that a first rent charged in excess of $2,000.00 was legal and could be used as the legal basis for deregulation by claiming that no Notice of Initial Registration was served in connection with the premises until November 9, 2011 (see *id.*, ¶¶31-32).

Plaintiff maintains that the $80,000.00 in renovations in 2010 did not cause the unit to be exempt from regulations because the unit was occupied by plaintiff pursuant to the lease agreement beginning June 1, 2009 (see *id.*, ¶33). Plaintiff states that allowing defendant to amend its answer will in fact be prejudicial because it will change or modify the focus of their discovery and likely require their discovery requests to be redrafted (*see id.*, ¶36).

Plaintiff asserts that because defendant chose to file the nonpayment proceeding currently pending in a Housing Part of the Civil Court, the issue of use and occupancy should be addressed in that proceeding as well. Plaintiff argues that since no claim for unpaid rent or claim for use and occupancy was in defendant's verified answer or proposed amended answer, these issues should not be heard in this Court (see *id.*, ¶¶6-9). Plaintiff further states that defendant's attempt to litigate some rent claims before Housing Court and this Court is a violation of the doctrine against the splitting of claims (see *id.*, ¶11).

STANDARD

CPLR § 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . Leave shall be freely given upon such terms as may be just . . . ." The law in New York is well settled that such leave shall be freely granted absent prejudice or surprise resulting from the delay (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should, of course, be freely given"]). The First Department has "consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted . . . " (*Ancrum,* 301 AD2d at 475; *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept. 2005]). "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Thompson*, 24 AD3d at 205; see *Ancrum*, 301 AD2d at 475; Davis & *Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

DISCUSSION

Defendant's Motion Seeking Leave to Serve an Amended Answer

When considering proposed amendments, "this court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face" (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007], citing *Hospital for Joint Diseases Orthopaedic Inst. v Katsikis Envtl. Contrs.*, 173 AD2d 210, 210 [1st Dept 1991]). Once a party seeking to amend pleadings has set forth a prima facie basis for the amendment "that should end the inquiry" (*id.*). Additionally, "the legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*Lucido*, 49 AD3d 220 at 227, citing *Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept 2004])

Here, defendant seeks to amend its answer and the Court finds that defendant has set forth sufficient evidence to establish that its proposed amended answer contains new affirmative defenses which sufficiently state causes of action. In opposition plaintiff does not set forth sufficient evidence to show that defendant's six proposed affirmative defenses are devoid of merit, as defendant's proposed amended answer is based on relevant case law and statutes.

Defendant has also established that plaintiff will not be prejudiced by allowing the amendment since there has been no discovery in the herein action (*see Seda,* 181 AD2d 469 at 470 ["in the absence of meaningful discovery plaintiff has demonstrated no prejudice"]). As such, defendant's motion seeking to serve an amended answer is granted.

Defendant's Motion Seeking Use and Occupancy

Defendant also seeks an order directing plaintiff to pay use and occupancy for the subject apartment during the remainder of this action at $4,200.00 a month. In its motion defendant only seeks monies owed for use and occupancy after the lease expired on

November 30, 2010. Contrary to plaintiff's assertion, defendant does not seek monies for back rent owed to it during the lease period in this action, instead defendant seeks this relief in the summary nonpayment proceeding in Civil Court.

The award of use and occupancy for the pendency of a proceeding "accommodates the competing interests of the parties in affording necessary and fair protection to both" (*MBB Assoc.*, 169 AD2d 422 at 422, citing *Eli Haddad Corp. v Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984]. Use and occupancy awards "preserve the status quo until a final judgment is rendered" (*Corris v 129 Front Co.*, 85 AD2d 176, 177 [1st Dept 1982]. Accordingly, it would be "manifestly unfair that defendant herein should be permitted to remain in possession of the subject premises without paying for their use" (*Albright v Shapiro*, 92 AD2d 452, 453-454 [1st Dept 1983]. In addition the $4,200.00 a month rent reserved under the lease agreement is the appropriate figure to set the payment amount pendente lite (*see Eli Haddad*, 102 AD2d 730 at 731). Thus the portion of defendant's motion seeking an order directing plaintiff to pay use and occupancy in the amount of $4,200.00 a month, from the expiration of the lease on November 30, 2010, and continuing until the herein action is resolved, is granted.

Upon the foregoing papers, it is

ORDERED that defendant's motion, pursuant to CPLR 3025(b), for leave to amend its answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this Order with Notice of Entry thereof; and it is further,

ORDERED that plaintiff is directed to pay defendant use and occupancy for the subject apartment in the amount of $4,200.00 a month, beginning from November 30, 2010 and continuing though out the pendency of this litigation; and it is further,

ORDERED that defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly; and

It is further,

ORDERED that all parties are directed to appear for a Preliminary Conference at 2:30 p.m. on September 26, 2012, at 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

Dated: 7-16-2012

Enter:

Paul Wooten J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE